HIV/AIDS AND SOUTH CAROLINA LAW

Second Edition

DISCLAIMER

This publication is intended to be a general introduction to some of the many legal issues arising from the HIV/AIDS epidemic. It is not intended as a legal guide and should not be used as a substitute for the advice of a lawyer. The laws are constantly subject to interpretation by the courts and amendment by the legislature; therefore, one should always consult a lawyer for current and detailed information concerning the status of the law.

This publication only provides an overview of issues and should not be considered a substitute for individual legal research. The referenced statutes and other provisions of law are subject to change, even as soon as the next legislative session. Therefore, the booklet serves as a current overview and guide to legal issues as of summer 1993 but is not a substitute for individual and updated legal research.

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HIV/AIDS and South Carolina Law

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I. INTRODUCTION

When a client tells his or her attorney that the client is infected with HIV, the virus which causes AIDS, there are particular legal issues of which the attorney should be aware. Similarly, an attorney advising a business client should be aware of the legal issues surrounding HIV/AIDS in the workplace. The purposes of the second edition of this booklet are to update and educate the Bar about special legal issues pertaining to persons with HIV/AIDS and to inform persons with HIV/AIDS about legal issues which they should discuss with their attorneys.

II. MEDICAL FACTS

A. General Information

The Human Immunodeficiency Virus (HIV) is a virus which attacks the immune system. After several months to many years (average 10 years), the virus causes Acquired Immune Deficiency Syndrome (AIDS). HIV infection weakens the body's natural defenses against certain illnesses that normally do not affect healthy people. These illnesses can result in death. The most common illnesses found in people with HIV include the lung infection pneumocystis carinii pneumonia (PCP), yeast infections, and malignancies such as Kaposi's sarcoma (KS), a form of skin cancer. Also, the progression from HIV infection to AIDS may be influenced by other infections or illnesses, alcohol, drug abuse, cigarette smoking, poor nutrition, and stress.

B. Progression of HIV Disease to AIDS

Most HIV infected persons will remain healthy and show no symptoms of AIDS for a long time. The current laboratory tests determine whether a person has been infected with HIV, not whether a person has the complex syndrome known as AIDS. There are essentially four stages in the progression from initial HIV infection to the development of AIDS.

1. Initial HIV Infection. The person first becomes infected with HIV. In about half the cases, the person experiences a flu-like illness approximately one month after initial infection.

2. Long-term asymptomatic (no symptoms) period. Almost all persons with HIV infection experience a lengthy period of time with no symptoms of disease.

3. HIV disease. Early symptoms of HIV disease may include fever, weight loss, diarrhea, oral thrush, certain rashes, swollen lymph nodes, etc. The occurrence of these symptoms does not necessarily mean a person is infected with HIV, but he or she should seek medical evaluation and possibly HIV testing.

4. AIDS. In most cases, HIV disease progresses and culminates in AIDS, a syndrome of susceptibility to many infections and diseases as a result of a very weakened immune system. Most persons experience a latency period of approximately 10 years between infection and development of full-blown AIDS, although this latency period may be shorter for women and children.

C. Modes of Transmission of HIV

During any of these stages, HIV infected persons may infect other persons if they engage in activities known to transmit the virus. According to the National Centers for Disease Control and Prevention (CDC), there are three types of activities known to transmit HIV.

1. Sexual contact. This is the most common mode of transmission. The highest risk sexual behavior for both men and women is anal sex because it allows HIV in semen to enter the blood stream easily. However, HIV is also spread by vaginal intercourse and in some instances by oral sex. Anyone who is sexually active can become infected with HIV or spread HIV through sexual contact which results in the exchange of blood or genital fluids.

2. Blood Contact.

a. Direct blood-to-blood contact. This includes sharing hypodermic needles, syringes or "works." In the healthcare setting it may include rare accidental exposures such as serious needlesticks.

b. Transfusion of blood or blood products. All donated blood is tested for HIV, making the blood supply much safer than in earlier days of the epidemic.

3. Mother to baby. In about one in three cases involving an HIV infected mother, the virus is passed from a mother with HIV/AIDS to her baby during pregnancy, birth, or breast feeding.

The CDC reports that no one has become infected with HIV by living in the same home with, working beside, being near, eating with or simply touching a person who has HIV or who has developed AIDS. People can engage in everyday activities such as working with others, shaking hands, attending public events, eating in restaurants and swimming in public pools without any risk of getting HIV. While small amounts of the virus have been found in the saliva and tears of some persons who have progressed to AIDS, there is no evidence HIV can be transmitted by these fluids.

To date there is no known cure for HIV/AIDS. Persons infected with HIV or diagnosed with AIDS should seek medical attention early and explore opportunities to participate in clinical trials of developing drugs and therapies. Each program raises different considerations of risk, benefit and informed consent.

D. Universal Precautions

In 1987, the CDC developed a strategy of universal blood and body fluid precautions to address concerns regarding transmission of HIV. This strategy, now referred to as "universal precautions," stresses that all persons should be assumed to be infectious for HIV and other blood-borne pathogens. Basically, these guidelines recommend general infection control procedures such as handwashing and glovewearing, cleaning of blood and certain body fluid spills with an appropriate disinfectant (such as Clorox), and proper disposal and disinfection of needles, equipment, cleaning materials, etc. *Guidelines for Prevention of Transmission of Human Immuno deficiency Virus and Hepatitis B Virus to Health-Care Workers and Public-Safety Workers*, Centers for Disease Control, MMWR (Recommendations and Reports) Vol. 38, No. S-6, June 23, 1989.

E. Expanded CDC AIDS Case Definition

On January 1, 1993, the CDC implemented the Revised HIV Classification System and Expanded AIDS Case Definition, which lists the criteria by which a person is diagnosed with AIDS. The expansion was necessary to properly recognize and categorize all persons suffering from HIV-related severe immune deficiency. (CDC, MMWR, Vol. 41, No. 18, Dec. 12, 1992). For the purposes of meeting the expanded CDC AIDS case definition, one must be infected with HIV and have either a T4 cell count of less than 200 or have any of 26 secondary conditions, which now include pulmonary tuberculosis, recurrent bacterial pneumonia, and cancer of the cervix.

F. Tuberculosis

There is a resurgence of tuberculosis in the United States, mainly due to the overlap between TB and HIV/AIDS. (CDC, MMWR, Vol. 39, No. RR-17, Dec. 17, 1990; CDC, MMWR, Vol. 41, No. RR-5, Apr. 17, 1992.) Furthermore, there are increasing numbers of outbreaks of tuberculosis infections which are resistant to multiple drug therapies (MDR-TB). These cases of MDR-TB are very difficult to treat and unfortunately are easily spread by prolonged "casual contact." (CDC, MMWR, Vol. 41, No. RR-11, June 19, 1992.)

III. SOUTH CAROLINA PUBLIC HEALTH STATUTES

A. HIV Testing to Protect the Public Health

Through its local health departments, the South Carolina Department of Health and Environmental Control (DHEC) offers free and confidential HIV testing to all persons. All persons tested receive appropriate pretest and post-test counseling. Test results may be obtained only in person, not over the telephone. Private physicians may also order HIV testing of their patients. They must report positive test results to DHEC as discussed below.

If it becomes necessary to protect the public health, DHEC has authority to require an individual infected or suspected of being infected with any sexually transmitted disease, including HIV infection, to be examined or tested and to report for treatment. S.C. Code Ann. § 44-29-90 (Supp. 1998). The laws regarding protection of the public health from sexually transmitted diseases are found generally at S.C. Code Ann. § 44-29-10 through 230 (Supp. 1998). Modernized regulations detailing how these statutes are implemented by DHEC are found at S.C. Code Regs. 61-21 (Supp. 1992).

B. Reporting and Confidentiality

DHEC is responsible for protecting the public health of the citizens of the state and works through its central office and local health departments to accomplish that goal. HIV infection is a contagious and infectious disease which is classified by DHEC as a sexually transmitted disease. S.C. Code Ann. § 44-29-60 (Supp. 1992); S.C. Code Regs. 61-20 § 1 (Supp. 1998); S.C. Code Regs. 61-21 (Supp. 1998). Physicians, laboratories, administrators of healthcare facilities and penal institutions, etc. are permitted to report HIV positive test results to DHEC. S.C. Code Ann. §§ 44-29-10, 70 and 80 (Supp. 1992); S.C. Code Regs. 61-20 and 21 (Supp. 1998). See *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). State is permitted to collect these types of results. 429 US at 6. See also *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 487-8 (4th Cir. 1992). Failure to report may result in criminal penalties as well as possible civil liability. S.C. Code Ann. § 44-29-140 (Supp. 1992); see *Derrick v. Ontario Community Hospital*, 47 Cal.App.3d 145, 120 Cal.Rptr. 566 (1975), *Doe v. American Red Cross*, 788 F. Supp. 884 (1992).

All information reported to DHEC regarding a sexually transmitted disease, including HIV positive test results, must be kept strictly confidential. S.C. Code Ann. § 44-29-135 (Supp. 1998). The statute making HIV information and records held by DHEC strictly confidential applies only to DHEC, not to records of physicians or hospitals. The statute protects DHEC records from subpoena except in the following five limited circumstances:

- Statistical data in which no individual person can be identified is released periodically by DHEC.
- A person may consent to release HIV/AIDS information regarding himself or herself only. Some persons seeking to qualify for benefits such as Medicaid may receive free T4 cell testing at the health department and request that those test results be sent to the agencies that provide those benefits.
- The information may be released to the extent necessary to enforce public health statutes and regulations. These public health laws include a procedure for isolation when an infected person refuses to conduct himself or herself so as not to expose other persons to HIV, usually through sexual or needle-sharing behavior. These statutes also include S.C. Code Ann. § 44-29-145 (Supp. 1998), which makes it a felony knowingly to expose, through particular conduct, another person to HIV infection without informing that person of the risk. (This criminal statute is discussed in Section E below.) S.C. Code Ann. § 44-29-136 (Supp. 1998) details the procedure by which DHEC records may be accessed to enforce the criminal statute.
- The information may be released to medical personnel to the extent necessary to protect the health or life of any person.
- Regarding minors, there are two instances in which HIV/AIDS information must be released. First, the information about the minor must be released to DSS if it is suspected the minor became infected with HIV as a result of child abuse. Second, when a minor is infected with HIV and is attending a public school, the school superintendent and the school nurse or other health professional assigned to the school must be notified.

It is important to note again that this confidentiality statute applies only to sexually transmitted disease information and records held by DHEC and does not apply to the records held by private physicians.

C. Partner Notification

Partner notification is a process by which an infected person (the index case) is asked to identify persons whom he or she may have exposed to the infection so that those persons may be notified of their risk of exposure. When DHEC conducts partner notification, the name of the index case is not revealed. S.C. Code Ann. § 44-29-90 (Supp. 1998). This process preserves confidentiality while directing counseling and testing efforts towards those persons most at risk of contracting the disease.

There is also a separate statute that states that a physician or state agency identifying and notifying a spouse or known contact of a person having HIV or AIDS is not liable for damages resulting from the disclosure. S.C. Code Ann. § 44-29-146 (Supp. 1998). In light of common law doctrines of duty to warn and the existence of this statute, physicians must consider the need to notify spouses or known contacts of a person with HIV/AIDS. See *Sharpe v. S.C. Dep't of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987). Physicians' compliance with the reporting statute is strongly encouraged so that DHEC may carry out its partner notification process in addition to the physicians' efforts.

D. Management of Recalcitrant Persons Harmful to Public Health

Most persons infected with HIV conduct themselves so as not to expose others to HIV infection. However, there are a few persons who either do not or cannot change their behaviors and insist on engaging in conduct that puts other persons at risk. If the public health officer believes a person is a threat to the public health, DHEC will provide counseling. If the person has refused counseling or if DHEC is unable to locate the infected person, a certified letter stating the necessary behavioral modification is sent to the person's last known address. If this step is not successful in effecting behavioral changes, DHEC may issue a public health order requiring the recalcitrant person to comply with appropriate directives to protect the public health. Failure to comply with the public health order allows the public health officer to petition the Probate Court for an order requiring isolation of the recalcitrant person. S.C. Code Regs. 61-21 (Supp. 1998).

E. Unlawful Exposure of Others to HIV

S.C. Code Ann. § 44-29-145 (Supp. 1998) makes it a crime for a person who knows that he or she is infected with HIV to:

- knowingly engage in sexual intercourse, vaginal, anal, or oral, with another person without first informing that person of his or her HIV infection;
- knowingly commit an act of prostitution with another person;
- knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids;
- forcibly engage in sexual intercourse, vaginal, anal or oral, without the consent of the other person, including one's legal spouse; or
- knowingly share with another person a hypodermic needle, syringe, or both for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from the other person's body without first informing that person that the needle, syringe or both have been used by someone infected with HIV.

A person who violates this statute is guilty of a felony and, upon conviction, must be fined not more than $5,000 dollars or be imprisoned for not more than 10 years.

F. HIV Testing of Convicted Sex Offenders

Within 15 days of the conviction of any person for a crime involving sexual battery as defined in S.C. Code Ann. § 16-3-651, or sexual conduct as defined in S.C. Code Ann. § 16-3-800, if the conduct results in the exposure of the victim to blood or vaginal or seminal fluids of the convicted offender, the solicitor shall require the convicted offender to be tested for HIV. Likewise, upon conviction of any person for violation of S.C. Code Ann. §§ 16-15-90, 100, 120, or 140, if the violation results in the exposure of the victim to blood or vaginal or seminal fluids of the convicted offender, the convicted offender must be tested for HIV. S.C. Code Ann. §§ 16-3-740 and 16-15-255 (Supp. 1992), respectively, mandate HIV testing at these times and set forth the procedures for the testing, reporting of the test results and payment for the cost of the test. Some states allow this testing to be conducted when the defendant is charged with the offense.

G. Healthcare Workers and Occupational Exposure

S.C. Code Ann. § 44-29-230 (Supp. 1998) provides for HIV testing of a patient if, while working with the patient's blood or body fluids, a healthcare worker may have been exposed to HIV and a physician has probable cause to believe the incident may have caused infection.

The Ryan White Care Act of 1990 mandated the implementation of a system of notification of Emergency Response Employees (ERE) of the existence of any variety of pathogens (respiratory, blood, others) in a patient from whom the ERE sustained a bona fide exposure. This system of notification will be implemented through CDC and state public health offices.

In 1992, OSHA implemented the Bloodborne Pathogens Standard which requires all employers to enhance employee safety through training, equipment use, Hepatitis B (HBV) vaccination, post-exposure medical management, and standardized infection control procedures for employees who are "reasonably anticipated" to be at risk of occupational exposure to HIV and HBV. (A pathogen is a germ that causes infection or disease.)

H. HIV and/or HBV Infected Healthcare Workers

Effective June 2, 1992, S.C. Code Ann. § 44-30-10 to -90 (Supp. 1998) established the South Carolina Health Care Professionals Compliance Act. The purpose of this Act is to implement Public Law 102-141, § 633 and the CDC recommendations published in MMWR, Vol. 40, No. RR-8, July 12, 1991. The CDC recommends that healthcare workers who are engaged in "exposure prone invasive procedures" know their HIV/HBV status. Public Law 102-141, § 633 required the states to adopt either the CDC recommendations or their equivalent as approved by the CDC. This Act requires the state's professional licensing boards to adopt the CDC recommendations for prevention of transmission of HIV/HBV from healthcare workers to patients. This law also requires the establishment of expert review panels to make recommendations to healthcare workers regarding the practice patterns of individual practitioners. Additionally, healthcare workers must undergo educational training in infection control techniques and universal precautions.

IV. INDIVIDUAL LEGAL ISSUES

A. Government Benefits

Persons with HIV/AIDS may be eligible for a variety of monetary or other governmental benefits. Following is a list of agencies and the type of benefit the program provides.

U.S. Social Security Administration:

- Social Security Disability—monthly payments
- Supplemental Security Income—monthly payments
- Medicare—payments to physicians and hospitals

County Department of Social Services:

- Aid to Families with Dependent Children—monthly payments
- Food Stamps—food stamps
- Medicaid—payments to physicians and hospitals (Discussion of S.C. Medicaid waiver for persons with HIV/AIDS is below.)

Local Community Long Term Care Office:

- Community Long Term Care—nursing care

Local Medically Indigent Assistance Fund:

- Medically Indigent Assistance Fund—payments to hospitals

Local Public Housing Authority:

- Housing Assistance Payments—payments to landlord

Ryan White Care Act provides medical care, case management and other assistance.

Housing Opportunity for People with AIDS (HOPWA), a grant program that provides money for rent, utilities, support services and medical assistance administered by the HIV Division of DHEC.

South Carolina is fortunate to have qualified for a waiver under the Medicaid Program to enable persons with symptomatic HIV or AIDS to receive Medicaid benefits more readily even though their income exceeds the regular Medicaid income limit. The State Health and Human Services Finance Commission administers the Medicaid Program and should be contacted regarding the waiver and other benefits.

Some of the programs listed above impose a period of disqualification on persons who have knowingly transferred resources for the purpose of qualifying for benefits. As persons with HIV/AIDS may need benefits and/or long-term healthcare through these government programs, attorneys should advise clients concerning prohibitions or rules regarding qualifications and transfers of property occurring near the time of application for those benefits. The following specific provisions may be useful:

- AFDC and Food Stamps Manual, Chapter 6, § 6.14 (transfers within three months of application);
- Medicaid Manual, Chapter 13, § 1305.03, and Chapter 16, Section 1602.02.01 (home);
- SSI Regulations 20 C.F.R. Section 416.1246 (24 months after date of transfer);
- HUD Housing Program Regulations, 24 C.F.R. Section 813.102 (Section 8); 24 C.F.R. Section 913.102 (public housing) (both two years prior to application).

B. Insurance

Persons with HIV/AIDS fear losing their insurance benefits. Most persons obtain insurance coverage through their employment. Therefore, continuation of employment and knowledge of the laws forbidding employment discrimination against handicapped or disabled persons are very important. Except for large group plans, insurance companies may require an applicant to be tested for HIV infection as part of the underwriting process for the insurer to decide whether the applicant will be accepted or rejected for health or life insurance. Title V of the Americans with Disabilities Act effectively excludes private insurers from the nondiscrimination requirements of the Act and allows them to structure their plans in a manner which can deny coverage to persons with HIV infection. Employers who provide their own health insurance to their employees (known as self-insurers) may also be exempt from the antidiscrimination provisions of the Employee Retirement Income Security Act (ERISA) and may impose limitations on benefits paid for HIV and AIDS treatment. See *McGann v. H&H Music Co*., 946 F.2d 401 (5th Cir. 1991).

At the present time, the South Carolina Health Insurance Risk Pool, established to provide medical insurance for qualified citizens who have been unable to obtain health insurance coverage from other sources, excludes persons with HIV infection from its coverage. See S.C. Code Ann. § 38-74-30 (D)(8) (Supp. 1992). At the time of this printing, a lawsuit challenging this exclusion as being violative of the Americans with Disabilities Act had been filed in U.S. District Court (Columbia Division). For future reference, the case is captioned *John Doe and PALSS v. S.C. Health Ins. Pool, et al.*, Case No. 3.93-0674-21.

Also at the time of this printing, legislation was pending in the General Assembly which would require all insurance companies in the state providing coverage to employers with fewer than 50 employees to make available at least two employee health insurance plans which, among other features, would not "restrict or exclude coverage or benefits for specific diseases, medical conditions or services otherwise covered under the plan." See 1993 Senate Bill 541.

C. Housing and Public Services

The Federal Fair Housing Act, Title VIII, addresses discrimination against handicapped persons in publicly assisted housing and various loan and mortgage arrangements. Thus, discrimination on the basis of handicap is prohibited in the provision of housing. Federal regulations recognize HIV infection as a handicap. 24 C.F.R. Ch. 1, Sub ch. A, App. 1 and 28 C.F.R. pt. 36, App. B. Also, there is a state Fair Housing Act which prohibits discrimination against handicapped persons with regard to housing. S.C. Code Ann. § 31-21-10, *et seq.* (Supp. 1992).

Most importantly, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. § 12101 et seq., protects disabled persons from discrimination in the provision of a multitude of services, regardless of whether the provider receives federal funding. The ADA covers many topics, including but not limited to programs, activities, benefits, other opportunities, public services, public accommodations and services operated by private entities, telecommunications and transportation. The provisions of the ADA concerning public accommodations and state and local governments became effective on January 26, 1992. Also, most state and local governments are subject to Section 504 of the Rehabilitation Act of 1973.

D. Schools

The Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. (1985) prohibits discrimination against disabled persons who are "otherwise qualified" by educational institutions receiving federal financial assistance. 29 U.S.C. § 794. HIV/AIDS is considered a disabling condition under this Act. *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987) (kindergarten); *Ray v. Sch. Dist*., 666 F. Supp. 1524 (M.D. Fla. 1987) (elementary school); *Robertson v. Granite City Community Unit Sch. Dist*., 684 F. Supp. 1002 (S.D. Ill. 1988); *Dist. 27 Community Sch. Bd. v. Bd. of Ed.*, 502 N.Y.S.2d 325 (1986).

Furthermore, the ADA protects disabled persons from discrimination in the full and equal enjoyment of public services. The ADA covers places of education, including private schools at the level of nursery, elementary, secondary, undergraduate and postgraduate. The provisions of the ADA concerning public services became effective on January 26, 1992.

Under state law, whenever a minor infected with HIV is attending a public school, DHEC is required to notify the school superintendent and school nurse or other health professional assigned to the school. S.C. Code Ann. § 44-29-135(e) (Supp. 1992).

E. Real Estate Transactions

S.C. Code Ann. § 40-57-270 (Supp. 1992) declares that all psychological impacts or stigmas associated with a piece of real property, including the fact that a person with HIV/AIDS is or was an occupant of the property, are not material facts and need not be disclosed to a potential purchaser or lessee. No cause of action may arise against an owner of real estate or the owner's agent for failure to disclose to the transferee that the transferred property was psychologically impacted as described above. This section does not relieve an owner or agent of an obligation to disclose the physical condition of the premises. Nothing in the statute immunizes an owner or his agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property concerning psychological impacts or stigmas associated with real property.

F. Civil Liability for Exposing Another to HIV

Civil liability for exposing another person to an infectious disease is generally recognized across the nation. See generally Annotation, *Tort Liability for Infliction of Venereal Disease*, 40 ALR 4th 1089 (1985 and Supp. 1992). See also, Comments, *AIDS—Liability for Negligent Transmission*, 18 Cum. L. Rev. 691 (1988). Liability may be premised on varying theories including battery, misrepresentation, fraud, intentional infliction of emotional distress and negligence.

The seminal case regarding civil liability for knowingly exposing a sex partner to a sexually transmitted disease is *Kathleen K. v. Robert B.*, 150 Cal. App.3d 992, 198 Cal. Rptr. 273 (1984). In *Kathleen K.*, the court decided the "trust and confidence" existing "in any intimate relationship" requires the truthful representation of facts related to infectious diseases. In *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985), the Georgia Court of Appeals held the duty to represent truthfully facts relating to infectious diseases springs from the duty "every individual in this state owes another" as opposed to any duty premised on intimacy or marriage. It is interesting to note that cases decided on theories sounding in negligence suggest the duty of care owed rises proportionally to the character of the disease and the danger associated with its communication. In the case of HIV, the duty would obviously be at its height. *Mussivand v. David*, 45 Ohio St. 3d 314, 544 N.E.2d 265 (1989).

One possible defense to an action for transmission of HIV to a sex partner is the illegality of the act which resulted in the infection. In South Carolina, adultery and sodomy are still defined as criminal acts. S.C. Code Ann. §§ 16-15-60 and 120 (1985). The illegality defense, loosely based upon doctrines of equity, bars plaintiffs from civil recovery for injuries which are a result of their own criminal act. However, the Georgia Court of Appeals in *Long* specifically rejected the illegality defense on grounds it was violative of public policy.

Under another theory, state prisoners in South Carolina filed a suit for damages and injunctive relief in federal court against the state Department of Corrections. They alleged their civil rights were violated by a prison policy which did not test all prisoners for HIV and did not segregate those prisoners who tested positive from the rest of the prison population. The court granted summary judgment to the Department finding no violation of the Eighth Amendment prohibition against cruel and unusual punishment. *Portee v. Tollison*, 753 F.Supp. 184 (D.S.C. 1990).

G. Blood Transfusion Issues

South Carolina has a blood shield statute which states that the implied warranties of merchantability and fitness shall not apply to transfers of human tissues and blood. S.C. Code Ann. § 44-43-10 (1985); *Samson v. Greenville Hosp. Sys.*, 295 S.C. 359, 368 S.E.2d 665 (1988) (blood shield statute does not violate equal protection clause of state constitution). The South Carolina Supreme Court has also held blood is not a product for purposes of strict liability in tort. *Samson v. Greenville Hosp. Sys.*, 297 S.C. 409, 377 S.E.2d 311 (1989). However, blood product providers do not have complete tort immunity. A plaintiff may allege a professional negligence cause of action. In order to hold a blood or blood product provider liable for transmission of HIV under

such a theory, the plaintiff must demonstrate the provider failed to conform to generally recognized and accepted practices in the profession. *Doe v. Am. Red Cross Blood Services, S.C. Region,* 297 S.C. 430, 377 S.E.2d 323 (1989) (transfusion of blood is skilled medical service); See also *Doe v. Am. Red Cross Blood Services, S.C. Region,* 125 F.R.D. 637 (D.S.C. 1989) (summary judgment granted to defendant on issue of negligent testing)

One topic of some significance in this area is the discovery of the identity of blood donors. For a general reference, see Annot., *Discovery of Identity of Blood Donors*, 56 A.L.R. 4th 755 (1987 and Supp. 1992). The United States District Court for the District of South Carolina has addressed this matter in several opinions with varying results. *Doe v. Am. Red Cross Blood Services, S.C. Region,* 125 F.R.D. 646 (D.S.C. 1989); *Watson v. Medical Univ. of S.C.*, 1991 WL 406979 (D.S.C. 1991); *Doe v. Am. Nat'l Red Cross,* 788 F.Supp. 884 (D.S.C. 1992).

H. Wills and Disposition of Body

Although everyone is encouraged to give careful consideration to preparing a will, the issue becomes more significant for persons with HIV/AIDS. Issues to consider in will drafting include disposition of assets and guardianship of children.

Other issues which arise after death are funeral arrangements, custody of and disposition of the body. Persons infected with HIV or at risk for HIV should not provide for donation of body or body parts. Also, S.C. Code Ann. § 44-29-20 (Supp. 1992) addresses notification regarding transportation and handling of human remains infected by dangerous, contagious or infectious disease.

I. Powers of Attorney and Living Wills

Persons with HIV/AIDS may also need to consider a power of attorney, which is an instrument authorizing another person to act as one's agent (called an "attorney-in-fact") regarding certain matters. In light of the possibility of HIV dementia and physical disability during later stages of HIV disease, creating a power of attorney which is effective when the principal loses competence (called a "durable" power of attorney) may be advantageous in matters involving selling property, handling money, obtaining healthcare, etc. See S.C. Code Ann. § 62-5-501 (Supp. 1992). See also Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. (Supp. 1992).

Powers of attorney can also authorize the attorney-in-fact to make healthcare related decisions. South Carolina law recognizes that persons over age 18 have the fundamental right to control decisions relating to their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn. In April 1992, a new law went into effect specifically recognizing a statutory form healthcare power of attorney. This form allows the principal to designate another person to make healthcare decisions when the principal has become incompetent to do so and make organ donation directions (see Section H); it includes provisions allowing the principal to make choices regarding nutrition and hydration. See S.C. Code Ann. § 62-5-501 et seq. (Supp. 1992). This new law incorporates the substance of the previously enacted "Death With Dignity Act," S.C. Code § 44-77-10 et seq. (Supp. 1992) which provided for the so-called "living will." If a person wishes to expand the powers granted in these statutory forms or address her or his unique circumstances, it may be possible to combine the statutory form with an independently drafted durable power of attorney.

Whether an individual is employed or owns or manages a business, HIV/AIDS in the workplace raises important legal issues. Persons with HIV/AIDS who are able to perform their job duties and do not pose a direct threat to the health or safety of others are entitled to the same rights and opportunities in the workplace as persons with other life-threatening conditions. However, unlike other medical conditions, HIV/AIDS involves special workplace issues.

V. HIV/AIDS and the Workplace

A. Safety

The Occupational Safety and Health Act, 29 U.S.C. § 654 (1985), protects the safety of workers on the job. OSHA issued regulations on HIV and Hepatitis B on December 6, 1991. 29 C.F.R. § 1910.1030. They became effective in South Carolina on July 27, 1992. These regulations require employers (general industry as well as

healthcare) to establish a written exposure control plan for employees whose duties include exposure to blood in the workplace; provide free of charge safety precautions such as disposable latex gloves for first aid, mouth shields for CPR, and reusable household rubber gloves for clean-up; offer employees with exposure to blood the Hepatitis B vaccination series free of charge; and conduct employee training on HIV and HBV at least annually. The regulations require that employee medical records be kept confidential. OSHA investigates complaints of noncompliance and conducts routine inspections.

The standard does not protect employees whose duties do not include exposure to blood but become exposed while simply acting as good samaritans.

Furthermore, S.C. Code Ann. § 44-29-230 (Supp. 1989) provides for HIV testing of a patient when a healthcare worker has been exposed to the patient's blood or body fluids and a healthcare professional has determined the incident may have resulted in infection of the worker.

B. Employment Discrimination

Federal law, Title I of the ADA, 42 U.S.C. § 12101, prohibits discrimination in employment against persons with disabilities and requires that employers take steps to reasonably accommodate applicants and employees. The law became effective for state and local government employers on January 26, 1992; for private employers with at least 25 employees on July 26, 1992; for private employers with at least 15 employees on July 26, 1994. The law places restrictions on when employers can ask medical questions and require medical examinations. It also prohibits certain disclosures of medical information. Employers may require that employees be able to perform the essential functions of the job and not pose a direct threat to the safety or health of themselves or others. The Equal Employment Opportunity Commission (EEOC) investigates complaints under Title I of the ADA. Lawsuits may be filed after EEOC investigation. *EEOC v. AIC Security Investigations, LTD*, Dkt. No. 92-C-7330 (March 19, 1993) (jury verdict of $572,000).

A second federal law, the Rehabilitation Act, 29 U.S.C. § 701, imposes similar nondiscrimination and reasonable accommodation requirements on companies which receive funds from the federal government through grants or contracts. *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988).

A third federal law, the Family Medical Leave Act of 1993 (FMLA), P.L. 103-3, protects employees from discrimination or retaliation for exercising the right to take FMLA leave. The law applies to employers who operate facilities where at least 50 full-time and part-time workers are employed. The law provides workers who meet certain eligibility requirements with 12 weeks of unpaid leave, during which any employer-provided group health insurance must be maintained as it is for active employees. The United States Department of Labor enforces this law, which becomes effective August 5, 1993.

Pursuant to S.C. Code Ann. §§ 1-13-10, et seq. (1986), the South Carolina Human Affairs Commission (SCHAC) investigates complaints of employment discrimination. SCHAC also enforces the provisions of the South Carolina Bill of Rights for Handicapped Persons, S.C. Code Ann. § 43-33-510 (1985), prohibiting job discrimination against handicapped persons. The definition of handicapped persons as used in the Bill of Rights for Handicapped Persons is found at S.C. Code Ann. § 2-7-35 (1986) but is limited by provisions in S.C. Code Ann. § 43-33-510 (1985). Also, employees who are terminated may have the right to unemployment compensation and should call the local office of the South Carolina Unemployment Compensation Commission.

C. HIV Testing and the Workplace

Title I of the ADA permits medical inquiries and testing of applicants only after a conditional job offer has been made. Under federal and state law, persons may only be excluded from jobs on the basis of medical information if their medical condition would pose a direct threat to the health or safety of themselves or others or would prevent them from performing their jobs. It has been held that a state agency's policy of requiring testing of public employees for HIV and HBV invoked the protections of the 4th and 14th amendments of the U.S. Constitution, as there was no risk of transmission in the workplace to justify the testing. *Glover v. Eastern Nebraska Community Office of Retardation*, 867 F.2d 461 (8th Cir. 1989), cert. denied, 110 S.Ct. 321 (1989). However, mandatory HIV testing has been allowed in areas such as military and state department service. *Local 1812, Am. Fed. of Gov't Employees v. U.S. Dep't of State*, 662 F.Supp. 50 (D.D.C. 1987). Also, it has been held

that a hospital could require disclosure of HIV test results when obtaining the information is necessary to the hospital's implementation of the CDC criteria regarding HIV infected healthcare workers and necessary infection control. *Leckelt v. Bd. of Comm'rs*, 909 F.2d 820 (5th Cir. 1990).

CDC guidelines for counseling and testing recommend that pre-test and post-test counseling accompany testing. *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, CDC, MMWR, Vol. 36, No. 31, p. 509-515, August 14, 1987.

D. Workers' Compensation

Unprotected contact with blood or certain body fluids on the job may result in HIV infection, and post-accident testing of the exposed worker is specifically required under federal OSHA regulations. 29 C.F.R. § 1910.1030. Employers should seek legal advice regarding baseline testing of employees for workers' compensation purposes, as well as issues of obtaining consent and maintaining confidentiality. The South Carolina Workers' Compensation Commission will respond to inquiries regarding on-the-job injuries and contact with blood and certain body fluids.

E. Benefits

Title I of the ADA requires public and private employers to provide the disabled with equal access to employee benefit plans; however, EEOC regulations permit some differences based on risk. The legality of excluding benefits for HIV/AIDS is currently being litigated under the ADA. *Mason Tenders District Council Welfare Fund v. Donaghey*, 93 CIV 1154 (S.D.N.Y. filed 3/1/93). Such exclusions are lawful under federal benefits law. *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991), cert. denied, 1992 U.S. LEXIS 7177 (U.S. Nov. 9, 1992). However, insured employee benefit plans are subject to the regulation of the South Carolina Department of Insurance. S.C. Code Ann. § 38-71-510, et seq. (1976). The South Carolina Department of Insurance will investigate complaints regarding insurance practices.

Persons with HIV/AIDS who work at facilities where their employer maintains a minimum of 50 full-time and part-time workers may be covered by the Family and Medical Leave Act of 1993 (FMLA), P.L. 103-3. This law provides employees who meet certain eligibility requirements up to 12 weeks of unpaid leave, which may be taken as a block or intermittently. If the employer offers group health coverage, it must be maintained on the same terms for the duration of the leave, and if the employee returns from the leave, all benefits must be reinstated. The federal Department of Labor investigates complaints under the FMLA.

Federal benefits law, the Employee Retirement Income Security Act (ERISA) of 1974, prohibits employers from discriminating against employees for the purpose of interfering with rights under certain benefit plans. 29 U.S.C. § 1140 (1989); See *Doe v. Cooper Investments*, No. 89-B-597 (D. Colo., April 18, 1989) (Daily Lab. Rep. (BNA) No. 78 at 811).

F. Confidentiality

Title I of the ADA prohibits employers from disclosing medical information except to make employment decisions, to provide emergency treatment and to cooperate with governmental investigations.

South Carolina law protects persons from slanderous and libelous statements, invasion of privacy and intentional infliction of emotional distress. Because statements about HIV/AIDS in the workplace can result in lawsuits, managers and employees must be trained to keep this information strictly confidential, discussed only on a need-to-know basis. See *Cronan v. New England Tel. & Tel. Co.*, 41 FEP Cases (BNA) 1268 (D. Mass. 1986).

G. HIV/AIDS Policy

With the assistance of medical or public health professionals and legal counsel, businesses should adopt an HIV/AIDS policy which addresses the special issues surrounding HIV/AIDS in the workplace. If there is a union, the business should consult labor counsel first. Cf. *Johnson-Bateman Co.*, 295 NLRB No. 26 (June 15, 1989). The CDC Clearinghouse offers a publication entitled "Business Responds to AIDS," which includes draft policies.

H. Employee Education

OSHA regulations require annual HIV/AIDS education. 29 C.F.R. § 1910.1030; SCRR I, 71-1910.1030. Health educators from DHEC, local chapters of the American Red Cross and the South Carolina AIDS Training Network offer HIV/AIDS educational resources. Businesses should also make available to their employees DHEC and Red Cross brochures, posters, and videotapes and should publish related articles in business newsletters and on bulletin boards.

I. Management Education

The business's HIV/AIDS policy should be the basis of manager education conducted by medical and legal authorities and should cover all the special workplace issues involving HIV/AIDS, such as the refusal to work based on fear of HIV/AIDS in the workplace. See The National Labor Relations Act, 29 U.S.C. §§ 157, 143 (1985). See also 29 C.F.R. § 1977.12 (1989). Of particular practical importance is education of managers who directly supervise workers.

J. Record Keeping and Retention

HIV/AIDS related information may be contained in insurance and benefits records, evaluations, and inter-office correspondence. Confidential files should be maintained, and those responsible for the files should be trained. OSHA regulations regulate the maintenance and retention of records of HIV/AIDS education, training and post-exposure medical follow-up. 29 C.F.R. § 1910.1030; SCRR I, 71-1910.1030. EEOC regulations under Title I of the ADA regulate the maintenance of medical information and the retention of employment records. Statutes of limitation also should be considered in record retention.

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VI. RESOURCES

State:

DHEC HIV/AIDS Hotline: (800) 322-AIDS, (800) 322-2437
AIDS Upstate: (864) 250-0609
Low Country AIDS Service: (843) 747-2273, (843) 745-0431
PALSS Central: (800) 922-7319
South Carolina Human Affairs Commission: (803) 737-7800
South Carolina Workers' Compensation Commission: (803) 737-5700
South Carolina Department of Insurance: (803) 737-6160
State Health and Human Services Finance Commission: (803) 253-6100
South Carolina Protection and Advocacy System for the Handicapped, Inc.: (800) 922-5225, (803) 782-0639
Children Unlimited, Inc.: (803) 799-8311

National:

National AIDS Hotline: (800) 342-AIDS, (800) 342-2437
National AIDS Information Clearing House: (800) 458-5231
National Association of People With AIDS: (202) 898-0414
AIDS Clinical Trials Information Service: (800) TRIALS-A, (800) 874-2572
Drug Abuse Hotline: (800) 662-4357
ABA, AIDS Coordination Project: (202) 662-1025
National Lawyers Guild AIDS Network: (619) 233-1701

ACLU, AIDS and Civil Liberties Project: (212) 549-2500
LAMBDA Legal Defense and Education Fund, Family Relationship Project: (212) 809-8585
American Foundation for AIDS Research: (800) 392-6327
CDC Clearinghouse: (800) 458-5231
AIDS Treatment Information Service (ATIS) (800) 448-0440
People with AIDS Coalition (800) 828-3280

VII. LIST OF ACRONYMS

ADA: The Americans With Disabilities Act
AIDS: Acquired Immune Deficiency Syndrome
CDC: National Centers for Disease Control and Prevention
DHEC: South Carolina Department of Health and Environmental Control
DSS: South Carolina Department of Social Services
ERE: Emergency Response Employees
ERISA: Employee Retirement Income Security Act
HBV: Hepatitis B Virus
HIV: Human Immunodeficiency Virus
KS: Kaposi's Sarcoma
MDR-TB: Multiple Drug Resistant Tuberculosis
PCP: Pneumoncystis Carinii Pneumonia
OSHA: Occupational Safety and Health Administration
SCHAC: South Carolina Human Affairs Commission
TB: Tuberculosis